

Filed 4/12/19 In re M.M. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.M., a Person Coming
Under the Juvenile Court Law.

B292412
(Los Angeles County
Super. Ct. No.
18CCJP03009A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

ELIZABETH L.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Nichelle L. Blackwell, Commissioner. Reversed with directions.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Veronica Randazzo, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Elizabeth L. (mother) appeals from orders of the juvenile court following a jurisdiction and disposition hearing. Mother contends there was insufficient evidence to sustain a finding of jurisdiction over the child M.M. pursuant to Welfare and Institutions Code¹ section 300, subdivision (b)(1). The Los Angeles County Department of Children and Family Services (Department) concedes, and we agree, that the juvenile court erred in concluding that the child was subject to the jurisdiction of the court. Because the juvenile court's disposition and custody orders were issued pursuant to the jurisdiction finding, those orders are reversed. On remand, we will direct the juvenile court to dismiss the dependency petition and discharge the child from any previously ordered detention or restriction.

¹ Further statutory references are to the Welfare and Institutions Code.

II. BACKGROUND

A. *Department Referral and Detention Report*

On March 21, 2018, the Department received a referral alleging that mother physically abused the 14-year-old child. The child lived with mother and maternal grandparents in maternal grandparents' home. The reporting party indicated that mother and the child tried to hit one another two weeks earlier, during an argument about mother's drug use. According to the reporting party, mother only became aggressive when maternal grandparents were not home. Finally, mother had not been home for the past two weeks.

On March 27, 2018, the social worker visited maternal grandparents' home and interviewed the child, maternal grandmother, maternal grandfather, and mother. All four stated that mother had never physically disciplined the child and that mother had not been gone from the house for two weeks. The child and mother lived with maternal grandparents who stated they were never out of the home. The social worker did not observe any marks or bruises on the child. The child stated that she had cerebral palsy and mother took her to various appointments. Maternal grandfather added that he and mother shared responsibility for taking the child to her appointments. The child appeared well-groomed and physically healthy. She reported that her basic needs were met by mother and maternal grandparents. The social worker observed that the home was clean, organized, and furnished; the child had her own bedroom; and the home had sufficient food for the family.

As to mother's drug use, the child stated mother previously used drugs. Five years earlier, the child found a case in mother's room containing drugs. The child had not recently seen drugs in the home and had not observed mother use drugs. Maternal grandfather also acknowledged that mother used drugs in the past but "not in this house." Mother admitted to using methamphetamine in the past but denied using it presently. She agreed to take a drug test.

On April 17, 2018, the social worker received mother's April 4, 2018, toxicology report, which was positive for amphetamine and methamphetamine. On May 2, 2018, mother contacted the social worker and they discussed the toxicology report. Mother denied using methamphetamine. On May 4, 2018, mother met with the social worker and provided a list of all her medications. Mother stated she was required to drug test as part of her probation so she was not sure why she tested positive for methamphetamine. On May 8, 2018, the social worker contacted mother's probation officer to inquire about mother's compliance with drug testing. The probation officer said that mother had not tested for quite some time.

On May 8, 2018, the social worker contacted father, who lived in Bakersfield and previously used drugs. Father was not concerned about the child living with maternal grandparents.

B. Section 300 Petition and Detention Hearing

On May 10, 2018, the Department filed a juvenile dependency petition pursuant to section 300, subdivision (b)(1) alleging one count. The Department alleged mother was a current abuser of amphetamine and methamphetamine and her

drug use endangered the child's physical health and safety and placed the child at risk of serious physical harm, damage, and danger.²

On May 11, 2018, the juvenile court found a prima facie case that the child was a person described under section 300. The court ordered the child released to the home of maternal grandparents. Mother and father were provided referrals for random drug testing.

C. *Jurisdiction and Disposition Report*

On June 15, 2018, a dependency investigator interviewed mother. Mother stated she stopped using drugs nine years ago, but "when things fell apart," she began using again. She again stopped using drugs in June 2017. She denied using methamphetamine despite the April 4, 2018, test results. Mother stated she was at the home taking care of the child, and when she was not there, maternal grandparents took care of the child. Mother did not report to drug testing on March 29, 2018, May 11, 2018, June 6, 2018, and June 15, 2018. A last minute information filed July 27, 2018, indicated mother failed to show for drug testing on June 22, 2018, and July 11, 2018.

On June 27, 2018, the dependency investigator called the child on her cell phone because she was visiting father in Bakersfield. The child denied knowledge of mother's drug use.

² The Department also alleged that father failed to protect the child because he knew or should have known about mother's drug use. The juvenile court found the Department failed to meet its burden as to this allegation.

She stated that maternal grandfather and mother took her to medical appointments. The child stated she felt safe with mother and father.

On June 27, 2018, the dependency investigator called maternal grandfather, who stated that the child had lived in maternal grandparents' home since she was two years old. Maternal grandparents are retired and at home the majority of the time. Maternal grandfather and mother took turns taking the child to appointments. Maternal grandfather stated mother had abused drugs in the past, but he denied any current drug abuse by mother. According to maternal grandfather, if mother left the home for a period of several days, the maternal grandparents would provide adult supervision to the child.

The Department recommended the petition be sustained and jurisdiction be terminated with an order granting mother and father joint legal and physical custody of the child.

D. *Jurisdiction/Disposition Hearing*

On July 27, 2018, the juvenile court held the jurisdiction and disposition hearing. Following argument, the juvenile court sustained the section 300 petition against mother. For disposition, the court found clear and convincing evidence under section 361, subdivision (c)(1) that there would be a substantial risk of danger to the child's safety, protection, and well-being if she were to remain at home with mother, and there were no reasonable means to protect the child's physical well-being without removing the child from mother's physical custody. The juvenile court ordered the child placed in father's physical custody under section 361.2, subdivision (a).

The juvenile court also issued a custody order, granting joint legal custody to mother and father, but sole physical custody to father. It granted mother unmonitored visits at the home of father or maternal grandparents. The juvenile court terminated jurisdiction after issuing the orders.

III. DISCUSSION

A. *Appealability*

We first address appealability. “As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but ‘must be decided on a case-by-case basis.’” (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) “[T]he critical factor in considering whether a dependency appeal is moot is whether the appellate court can provide any effective relief if it finds reversible error.” (*In re N.S.* (2016) 245 Cal.App.4th 53, 60.) Here, a final custody order, granting physical custody of the child to father, may impact further proceedings concerning mother’s relationship with the child. The appeal therefore is not moot. (See *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1096, fn. 6 [appeal not moot, despite termination of juvenile court jurisdiction, because disposition order continued to affect the mother and her appeal challenged the juvenile court’s authority to make a child custody determination]; *In re J.K.* (2009) 174 Cal.App.4th 1426, 1431-1432 [appeal not moot as sustained jurisdictional findings had adverse effect on parent’s custody rights].)

B. *Dependency Jurisdiction over Child was in Error*

For a child to be found a dependent of the court under section 300, subdivision (b)(1) the court must find: “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . , or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . mental illness, developmental disability, or substance abuse.”

We review the juvenile court’s jurisdiction findings for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773; *In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) We do not pass on the credibility of witnesses, resolve conflicts in the evidence, or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court’s determinations to decide whether substantial evidence supports the findings. (*In re I.J.*, *supra*, 56 Cal.4th at p. 773; *In re D.L.*, *supra*, 22 Cal.App.5th at p. 1146.)

We conclude that substantial evidence does not support a finding of dependency jurisdiction. The juvenile court found mother was a current abuser of methamphetamine, which finding was supported by substantial evidence, namely, mother’s admission of past drug abuse and the positive test result of April 4, 2018. Mere drug use, however, is insufficient to show that a child is at a substantial risk of serious physical harm or illness. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Alexis E.*

(2009) 171 Cal.App.4th 438, 453.) A parent's substance use may support a finding of jurisdiction only if such use results in the parent failing to provide adequate care of the child. (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 768.)

The juvenile court found that mother's drug use led to the child having inadequate supervision, stating that the child "basically takes care of herself." But the record does not support this conclusion. It appears the juvenile court relied on maternal grandfather's statements in the jurisdiction and disposition report in which he reported that the child was "basically 'fully capable of taking care of herself'" because she was 14 years old and often not at home due to school. However, that statement did not mean, as the juvenile court concluded, the child was taking care of herself on her own. Indeed, in the same report, maternal grandfather insisted that he and maternal grandmother provided adult supervision to the child, including when mother was not present.

Even if mother was abusing drugs, there was no evidence that her substance abuse endangered the child. The child was well-groomed and physically healthy. Maternal grandfather helped the child attend all her medical appointments. Maternal grandparents' home was clean and had sufficient food. The record also suggests that mother did not use drugs in the home. While maternal grandparents and the child agreed that mother had a prior history of drug use, all denied seeing mother currently use drugs. In response to the appeal, the Department filed a letter stating it did "not oppose reversal of the juvenile court's jurisdictional findings on July 27, 2018," and that "there was insufficient evidence for the juvenile court to have sustained the allegation." Without a nexus between mother's drug use and

a risk to the child's physical safety and health, the child could not be declared a dependent under section 300, subdivision (b). (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 768.) Accordingly, the juvenile court erred by finding the child a dependent of the court.

Because we conclude the jurisdiction finding as to the child was erroneous, the juvenile court lacked authority to remove the child from mother's custody under section 361, subdivision (c)(1), and also lacked authority to issue its custody order.

IV. DISPOSITION

The jurisdiction finding, disposition order, and custody order are reversed. On remand, the juvenile court is directed to dismiss the petition and discharge the child from any detention or restriction previously ordered.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIM, J.

We concur:

BAKER, Acting P. J.

MOOR, J.